# Hawaiian Gazette

EST MODUS IN REBUS.

TUESDAY, : : AUGUST 21, 1888.


MR. MCCARTHY'S announcement that his candidacy is a blessing deferred, leaves a clear field to Wilder and Kaulukou. Wednesday, August 22d, is the day fixed for the burial of the latter gentleman. Alas! Mr. Kaulukou, it is hard for thee to kick against the pricks.

WEDNESDAY was an exciting day in the House, as the very full report of the debate which we publish will show. The discussion on the Contempt Bill was very full and the subject elicited some of the liveliest speeches of the session. The bill passed by a vote of 31 to 11. It is in order now for Judge Preston to demand an investigation.

WE clip the following choice bit from the Makaainana:

> At the present time the question of an election is before the public. There is no evil which we can ward off excepting what we may be able to accomplish during the coming election. But let all of us Hawaiins understand this, that there is opposition, hard feeling and division in the Reform party; therefore, it behooves us to work upon them so that our side shall get the benefit. And how shall we do this? There is only one road, to hide our sore feeling and unite with them, putting aside all differences in race.

MR. MCCARTHY is not going to run, and a card in Tuesday's Bulletin explains the reasons why. We were disappointed in the reasons. We thought he would have said that having been regularly elected a delegate to the nominating convention, it was not the honorable thing to take advantage of the fact that his candidate was not nominated, to run himself. But this is not the reason assigned. Mr. McCarthy does not want anything to do with the "missionary element." It appears that this element is going to vote for Mr. Wilder. That is enough for Mr. McCarthy. This fatal fact gives Mr. Wilder a fishy missionary odor. The only reason Mr. McCarthy does not run at once and "sweep" the missionary from politics forever, is that there is not quite time enough to organize his forces. So that consummation devoutly to be wished must be postponed to the election of '90.

Alas, Mr. McCarthy, you cannot get rid of these horrid missionaries. They may even embarrass you by voting for you. We do not know where Mr. McCarthy classes the ADVERTISER, but we presume he lumps us with the Home Guardian, Life and Light, The Faith Missionary, and other publications of that order. But if Mr. McCarthy had been the nominee of the convention the other night on the platform then adopted we should have supported him as heartily as we now support Mr. Wilder. Furthermore, if at the next general election the highly respectable persons who are unfortunately affected with missionary-phobia should control the convention and nominate Mr. McCarthy and a number of other gentlemen who are, as we hope Mr. McCarthy, is both capable and honest, and the nomination should be made on the principles of the Reform Party as they have been twice laid down in public platform, it is much to be feared, Mr. McCarthy, that these loathed missionaries would go to the polls and deposit their ballots for you and your confereres. What can be done to avert this misfortune? These missionaries are offensively peaceable. They refuse to quarrel with you. How are you ever to be rid of them? The only thing to be done is to mark their names on the voting list (so that people can find out who they are) and then get them together in Fort-St. Church or Cunha's or wherever they do most congregate and blow them all up with dynamite.

BILL 103, one of the acts relative to the liquor question, was before the House for discussion on Monday and Tuesday. This bill amends section 12 of the liquor law (of 1882) by making the restrictions on the jobbers a little easier. It further amends section 16 by providing that liquor saloons (including hotel bars) shall be closed at 10 o'clock at night. But it is the new section, 16B, which has caused the close discussion on the bill. It is noteworthy that the report recommending the adoption of this bill was signed by Mr. Frank Brown. He makes no secret, however, of the fact that his signing it was in the nature of a bargain. Section 16B proposes to enact here the celebrated anti-screen law. If adopted, liquor saloons will be compelled to abolish screens, blinds, painted or stained glass windows and any other method of concealing the interior of the saloon. The opposition to this clause combines two curiously opposite parties: those who are in favor of unrestricted liquor and those who are in favor of temperance on general principles and even of prohibition, but who regard the whole question of temperance legislation as practically excluded from the presen legislature, on account of a tacit agreement to that effect before the election, which induced an overwhelming vote for all of the reform candidates. Those in favor of the clause are also of two parties; those who favor any and all prohibition legislation and some who regard the screen law as merely an appropriate police regulation.

There is no doubt that in some districts at least, and with some candidates on both Noble and Representative tickets, there was such a tacit understanding. Others came into the Legislature free from any pledge—except to support the reform platform. Mr. Kinney led the opposition to the screen law on the theory that the present House has no right to meddle with the question, that the only fair and honorable method is to submit the whole question to the suffrages of the electors in 1890, and that those who take any other course now will be overwhelmingly "snowed under" in 1890. This at least assumes that an overwhelming number of electors are opposed to any restrictive legislation on the liquor question. It does not seem to accord with the great number of petitions to the last session from all over the country praying for restriction and prohibition legislation. We believe that the Attorney-General presented the matter in the correct light: that it would have been better not to have introduced the bill at all, but as it had come before the Legislature the only manly way was to treat the question wholly on its merits. As for himself he was perfectly willing to be "snowed under" if it was on such a question as that, or upon the rights of the people in general as opposed to one man power, or upon proper restriction upon the Chinese.

The screen law section was rejected by a vote of 21 to 19—the vote being carried by those who believe the question has no place in the present session. This probably ends all specially temperance legislation at this session.

THE election law was the special order of the day Thursday, and the provision for secret voting stirred up a warm debate. Perhaps our ears were closed by prejudice, but we heard no good speeches against this feature of the bill, and nothing which could be called an argument, except the statement that, as to illiterate persons, the bill would not secure absolute secresy. This is true, but if so important a law is going to be defeated because the legislators cannot get over so trifling a difficulty, it is time for our esteemed Legislature to adjourn and give the school-boys a chance. The names of the candidates of the different parties might be printed in different colors. There would rarely be more than two parties in the field, and we do not see why this simple expedient would not meet the difficulty. If for any reason it would not, doubtless something else could be devised.

The other arguments advanced by the opponents of the measure were of the flimsiest sort. Noble Smith thought the illiterate Portuguese would not know enough to put a check opposite a name and all such ballots would have to be rejected. The Hon. Noble got a good deal of fun out of this queer notion, and we think ourselves it was funny. Doubtless it is a scandalous libel, but if it is true, then let us be thankful that this law is going to furnish so easy a method of disfranchising such ignorant blocks. Representative Kinney, it was stated, was elected by such a constituency, and this may account for his determined hostility to a provision which will disfranchise (according to Noble Smith) his constituency, and so relegate him to private life. Minister Thurston's great argument was that, although this law is a very fine thing and secret voting is the ideal way, yet we are not up to it. It is good for others but not for us. And this argument he fortified by producing some statistics of illiteracy in this country. Unfortunately, he furnished no comparative statistics, which of course broke down his arguments entirely. The Attorney-General supplied the missing premise, showing that in the Province of Quebec, where the illiterate constitute an actual majority of the voting population, this law has worked for many years with conspicuous success. Unluckily the premise spoiled the Minister of the Interior's conclusion. The truth is that the ignorant voters are the very ones who require to be protected by this law. Their votes have been, here and everywhere, a commodity and this law takes them out of the market.

The truth is the arguments against secret voting are of the most elusive description. They are in a gaseous state. When they are reduced by a little cold water, the residuum is something very suspicious. It seems to amount to this: "We admit that secret voting is right in theory, that the bill proposes a great step forward, that the only way to insure an honest vote is to get a secret vote, but the fact is, if we pass this bill, we are afraid we will lose the next general election." Oh, what a lame conclusion and what a confession! Anyone would suppose that the Reform legislators owed their seat to a happy faculty of bull-dozing and pulling the wool over the eyes of the voters who cannot read, write or think, so sure are they that their seats will be lost as soon as they lose every means of influence except persuasion and argument. If there is nobody backing the Legislature except the ignorant and degraded, the Legislature would do well to step out. What is the mysterious influence which is perfectly honest and legitimate which the secret voting is going to destroy. We have never seen it materialize yet. Let us have a little healthy optimism. Mr. Hitchcock struck the right note. Here is a plan which insures an honest and a clean election. Let us drop the old corrupt methods and adopt this, and trust to the uprightness and intelligence of the country to carry us through. We are thankful to say that this view triumphantly prevailed, section 42 of the bill passing by a vote of 25 to 19.

## Supreme Court of the Hawaiian Islands--In Banco. July Term. A. D., 1888.

D. W. KANOELEHUA vs. A. J. CARTWRIGHT, TRUSTEE OF THE ESTATE OF EMMA KALELEONALANI.

*Bill in Equity to Declare and Execute a Trust.*

*Appeal from Decree of Judd C. J.*

BEFORE JUDD C.J., M'CULLY, PRESTON, BICKERTON AND DOLE, JJ.

*Opinion of the Court by Dole J.*

The following decision was rendered in this cause by the Chief Justice at Chambers:

This is a bill in equity to declare and enforce a resulting trust.

The facts of this case are concisely stated as follows: One Pahau, wife of plaintiff, received in 1881 and 1882, some six thousand dollars as her distributive share of the estate of the late C. Kanaina, as one of his heirs, the same being proceeds of real estate. This money was placed by her in Mr. A. J. Cartwright's hands, and it was paid out by him on her orders from time to time. The plaintiff and his wife, Pahau, had not been living together for many years, but in the long and expensive litigation which Pahau engaged in to determine her rights in the estate of Kanaina, she was obliged to use her husband's name, and he readily gave her his co-operation in procuring witnesses, and assisted in every way in the litigation, but I think it is well established that, though there was the appearance of reconciliation between them, they each continued the illicit relations with the paramours they had taken up with during the long separation. There is some evidence that plaintiff and his wife jointly signed the orders on the fund in Mr. Cartwright's hands. This is denied by Mr. Cartwright, but he does not produce the orders, and thinks he delivered them up to Pahau when he closed his accounts with her. I am of opinion that the plaintiff had not reduced this fund to his possession, and that it retained the character of real estate of his wife. The bill, moreover, alleges that it was plaintiff's wife's property.

After the death of Mr. Kanaina, in 1877, Pahau, who had been one of his retainers, transferred her allegiance to Queen Dowager Emma. Mr. Cartwright was the Queen's agent and business manager and this accounts for Pahau's putting her funds in his hands.

In 1881 and 1882 two parcels of land in Kauluwela, Honolulu, were purchased, one for $550, and another for $1,550, and paid for out of this fund in Mr. Cartwright's hands, and afterwards houses were erected upon them at Pahau's expense, and both she and plaintiff and several other retainers of Queen Emma's moved thither. Pahau lived there until her death, in 1886, and plaintiff continued there until ejected by process of law a few months ago. In both of the conveyances of the lands in question, Queen Emma is the grantee and the name of plaintiff or Pahau nowhere appears in them.

Mr. Cecil Brown testifies that he drew the conveyance for the second piece purchased, [the consideration for which was $1,550] that Pahau told him to make the deed in the Queen's name. Upon Mr. Brown's asking her why she wished it so done, she said the money came from Kanaina's estate, that her husband, Kanoelehua, had deserted her and she wished the property so fixed that he should have nothing to do with it; that she had an understanding with the Queen that she [Pahau] was to live on the land and take the rents, and that she would trust the Queen's word, although no life estate was reserved to herself in the deeds. Other witnesses say that Pahau wished the land put in the Queen's name lest Kanoelehua should mortgage the land, and she [Pahau] eventually lose it. Miss Lucy Peabody, an attendant of the Queen, who negotiated the first purchase for $550, says Pahau directed the conveyance to be in the Queen's name so that her [Pahau's] husband should have nothing to do with it. I think that all allegations of feebleness of intellect and ignorance on the part of Pahau and charges of fraudulent advantage taken of this by respondent are not sustained.

I find it to be established that plaintiff knew of the disposition of this property at the date of the deeds or soon after.

The question of law remains. Do these facts show that a trust has resulted in favor of plaintiff?

The law as laid down in Perry on Trusts, Vol. 1, Sec. 126, was adopted by this Court in *Oopau et al. vs. Kahapa et al.*, Oct. term, 1887: 'Where upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.' This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between them for collateral purposes."

In 2 Story, Sec. 1202, the author says, "where a man buys land in the name of another and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money. This as an established doctrine is now not open to controversy."

Bispham says, Sec. 80, "the reason of this doctrine is, that the man who pays the purchase money is supposed to become, or to intend to become, the owner of the property, and the beneficial title follows that supposed intention." Adams' Equity, Sec. 33, says, "Resulting trusts, where the intention to sever the legal and equitable ownership is apparent from the attendant circumstances, occur where the estate has been purchased in the name of one person and the purchase money or consideration has proceeded from another. In this case the presumption of law is, that the party paying for the estate intended it for his own benefit and that the nominal purchaser is a mere trustee."

But it is contended that "as a resulting trust may be shown by parol proof, as a presumption of law arising out of the transaction, so the presumption may be rebutted by parol proof, showing that no trust was intended by the parties and that it was the intention to confer the beneficial interest upon the supposed nominal purchaser," 1 Perry, Sec. 139. The same Section reads further, "As the resulting trust is a mere matter of equitable presumption it may be rebutted by facts that negative the presumption; and whatever facts appear tending to prove that it was intended that the nominal purchaser should take the beneficial interest as well as the legal title, negatives the presumption."

It must also be borne in mind that "the *presumption* is in favor of the trust resulting to the party paying the consideration, and the burden of proof is upon the mere nominal purchaser to show that he was intended to have some beneficial interest." Id.

Although there is evidence that Queen Emma contributed to the support of Pahau, from the time of Kanaina's death until she received her share of his estate, one witness testifying to the sum of $40 per month, there is no explicit evidence that this support was the reason why the deed was put in Queen Emma's name and was to stand as its consideration.

On the contrary, Mr. Brown and Miss Peabody, the only witnesses who testify as to Pahau's declarations made at the time the deeds were made, say that the reason that Queen Emma's name was placed in the deeds was in order that Pahau's husband might have nothing to do with the land.

The contribution by a chief of these islands towards the support of a retainer is nothing unusual, and the Queen might well have supported Pahau without the expectation of receiving the conveyance of this land.

It is not claimed by the respondent that this purchase and conveyance were intended to be an "advancement" to Queen Emma. The presumption of an advancement arises when "the purchaser takes the conveyance in the name of a wife, child or other person for whom he is under some natural, moral or legal obligation to provide." Perry, Sec. 148.

There was no such obligation on the part of Pahau. She was not bound to provide for Queen Emma. On the contrary, the obligation, if any, was on the part of the Queen to provide for her retainer.

I am aware of the feeling of obligation entertained by some of the old Hawaiians to leave their property to their Aliis, but this is a purely voluntary consequence of loyal respect and fealty, and is not an obligation that the courts could recognize as binding, or one that should be favored as against heirs at law.

To my mind these circumstances do not rebut the presumption that Pahau intended the Queen to be her trustee.

The fact that the nominal purchaser [Queen Emma] is dead does not affect the admissibility of parole testimony to show the resulting trust. Perry, Sec. 138.

Nor does the fact that Pahau is dead affect the right of her heir at law to bring this bill. Although the collateral purpose for which the conveyances were made, was to prevent the exercise of the present plaintiff as Pahau's husband of his marital rights over this property, and this purpose would apparently be defeated, by finding that the trust resulted in favor of Pahau, this husband being now her heir at law, Pahau's intention was that she, and not Queen Emma having advanced the purchase money, was to be benefitted by the transaction, and the incident that, on her death her husband is her sole heir, is one that the respondent representing Queen Emma's estate, cannot take advantage of.

Upon the whole case I find that a trust has resulted in favor of Pahau, and the plaintiff as an heir may have the relief prayed for.

Decree accordingly.

The learned Justice makes the following findings at the end of the first paragraph of his decision, *i. e.* "I am of opinion that the plaintiff had not reduced this fund to his possession, and that it retained the character of real estate of his wife. The bill, moreover, alleges that it was plaintiff's wife's property."

We do not support this conclusion but find that the sale of the lands of the Kanaina estate and the partition of the money proceeds under the order of the Court and in accordance with the statute of partition was a conversion of the real into personal property, [*Bartlett vs. Janeway*, 4 Sandford, Ch. 396,] and that as soon as the wife's claim against the Kanaina estate was paid in money, it vested in the husband without the necessity of his reducing it to possession. [*Reinemschneider, Administrator vs. Kalaeha*, 5 Hawn. 550.]

This view is an additional ground for the decree at chambers, for we support the decision appealed from in all other particulars.

The appeal is dismissed.

W. C. Achi for plaintiff; W. A. Kinney for defendant.

Dated Honolulu, Aug. 7, 1888.

## CORRESPONDENCE.

We do not hold ourselves responsible for the statements made, or opinions expressed by our correspondents.

### The Proposed Oahu Steam Railroad.

MR. EDITOR: I am only one of a number of men who represent and own property along the shore of Pearl Harbor, and as such owner, I am with others very anxious to see the passage of the franchise asked for by our fellow-citizen, Mr. B. F. Dillingham.

An effort is being made by a few to mislead the general public, and especially members of the Legislature, into a belief, that the promoter of the Pearl River Railroad scheme stands alone without backers or any reasonable hope of assistance to build the proposed road. Such assertions have been made, but utterly without foundation, and purely in the interests of the foreign "ring" or would-be monopolists.

While I am not opposed to the introduction of foreign capital for the general development of the resources of this country, I do seriously object to having steam railways on this island pass into the control of a foreign syndicate. I believe the day is not far distant when it will be regretted that the street tramway was not built and controlled by home capital. A more serious mistake will be to allow the control of our prospective Oahu Steam Railroad to pass into the same hands.

We should do our utmost to carry out the scheme as proposed by the original promoter and many stand ready to assist with capital and liberal concessions of land. I am one of many who appreciate the work done by the promoter, and who propose to stand by him, as I also believe every right-minded man in the community will do.

To refuse to grant Mr. Dillingham the franchise he asks for and to which he certainly is entitled, upon assumed grounds that he cannot raise the money to build the road, is too absurd for anything.

If the franchise granted is one favorable to investors and there is any capital at home or abroad that would be put into such an enterprise, it will certainly be secured as readily by the original promoter as by an outsider, and in the home market the odds are very largely in his favor.

Take, for instance, the franchise granted for the Street Tramway. Did William Austin find the money to build that road? And does it make one dollar's difference to the Treasury of this country whether that franchise was granted to William Austin or direct to Messrs. Skinner & Co.? Have Skinner & Co. furnished the money to build the Tramway? No! ! They have, as stated in their prospectus, "entered into a contract with another company" to build the road at a very magnificent profit to themselves. It is already understood with Mr. Dillingham that the franchise, if granted to him, is to pass into the hands of a home corporation, and while we are glad to recognize the service he has performed, it is only just to that gentleman, after what has been said of him by Mr. Gribble, to state that his terms to the proposed company are far more liberal than would have been asked.

I understand the committee have reported back the bill leaving out the subsidy. This is not in the line of progress. It is in the interests of the whole community to have this road built and it should be built and controlled by home capital. And why should not this enterprise have Government aid in the shape of a subsidy, when an exclusive franchise has been granted, with the subsidy asked for, for the construction of a cable telegraph?

The franchise owned by the London Tramway Co. is a valuable concession. Should not the tax payers of large interests in this country receive the assistance asked, when it will enhance the value of all property near or adjacent to the road and consequently increase greatly the revenue?

C. A. BROWN.

Honolulu, August 15, 1888.

### A Remonstrance.

MR. EDITOR: In this legislation for Hawaiians, now in process of enactment, I notice two measures of pernicious immorality. There is the "Act to mitigate," seeking to make easy the way of the transgressor; and the "Bill to amend the divorce law," making it easy to rid one's self of the obligations of the marriage covenant. Those of us who are working for the uplifting of the Hawaiian people are amazed that in any corner of Christendom, there should be found in this age of advanced civilization, Christian men, upholding and advocating such legislation. Are our legislators ignorant that the "Contagious Diseases Acts," after which the Hawaiian act was modeled, from the day they were passed till the day they were repealed, were denounced as a disgrace and a shame to the British Parliament? Laws may have little power to make men good; but they may contravene God's law of retributive justice, and foster vice rather than repress it. The British law was erased from the statute-book in 1886, after twenty years of persistent agitation and petition; so easy is it to decree iniquity by a law, and so difficult to undo the wrong. Some of the worst abuses under these iniquitous acts have been committed in the Government regulation of vice in India. But now after only one short year of public appeal, so recently as this last June, a resolution was presented to Parliament demanding the immediate and total abolition of this iniquity throughout the Indian Empire, and on its first presentation it was carried, without one single vote against it. It is high time that Christian people in Honolulu should demand in language that cannot be misconstrued, that this iniquitous "Act to Mitigate" shall be wiped off at once from the Hawaiian statute book. How many Christian people are there in Honolulu, who care in the least for the bodies or souls of these licensed women? Why not relieve at once the Trustees of the Queen's Hospital from their obligation to keep the women that are to be found in the wards of that institution, month after month? There they are supported at the public expense, under the guise of Christian charity; then sent out again to ply their legalized, nefarious trade. Will no one utter a word of remonstrance?

C. M. HYDE.

Honolulu, August 8, 1888.

### The Anti-Screen Clause.

MR. EDITOR: Your editorial yesterday upon the anti-screen bill rather put me in the light of having voted against that bill because I was afraid we would be "snowed under" in 1890 if we did. As a matter of fact I believe in the anti-screen bill and am willing to advocate it before the electors at any time; but my position was that as we had secured for the revolutionary party the votes of the liquor men and all classes who would naturally oppose this measure, by tacitly or expressly agreeing that we would not touch this social question, it would not be right for us after we had got in to make a radical change in the liquor laws simply because we were in, and that any such snap judgment would not in the long run help the temperance people. No radical change either for the liquor or the temperance men would be just this session. Such changes will have to be settled directly at the ballot box.

W. A. KINNEY.

Honolulu, Aug. 16.